U.S. Department of Labor

Office of Administrative Law Judges
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In the Matter of	:	
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ESTACE CLAY, JR.,	:	Dated: February 6, 2001
Claimant	:	
	:	Case No.: 2000-BLA-0372
v.	:	
	:	
PEABODY COAL COMPANY,	:	
Employer	:	
	:	
and	:	
	:	
OLD REPUBLIC INSURANCE CO.	:	
Carrier	:	
	:	
and	:	
	:	
DIRECTOR, OFFICE OF WORKERS'	:	
COMPENSATION PROGRAMS,	:	
Party in Interest	:	

S.F. Raymond Smith, Esq.
Pineville, West Virginia
For the Claimant

Paul E. Frampton, Esq.
Fairmont, West Virginia
For the Employer

Before: JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This is a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*

(hereinafter "the Act"). The claim was filed on January 6, 1999, and was denied by the Office of Workers' Compensation Programs ("OWCP").

Peabody Coal Company was designated as the responsible operator by OWCP, and controverted the claimant's entitlement to benefits. At the request of the claimant, a formal hearing was held in Mullens, West Virginia, on June 8, 2000.

The issues contested at the hearing were pneumoconiosis, causal relationship, total disability, causation, dependency and responsible operator. Based on the evidence contained in the record of this proceeding, I find that the claimant is not entitled to benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[1]

A. Background

Claimant is 57 years old, is married, and claims both his wife and one adult child as dependents under the Act (DX 1; DX 7; DX 8; DX 9). Employer contests that Claimant's adult child is a dependent, but the parties reserved the issue pending an award of benefits (TR 20-21). Claimant entered the military in 1962 and served in Vietnam for three years (DX 13; EX 7, at 3, 18). He began working in the coal mining industry in 1966. The parties stipulated that Claimant spent 29 years as a coal miner (TR 4-5). His first job was as a general laborer for Armco Steel Corporation, and he went on to perform work as a shuttle car operator, supply man, motor man, and trackman (DX 2; DX 3). In 1982, he began working as a dispatcher (DX 3). In February 1984, he began working for Peabody Coal Company and maintained his position as a dispatcher, although he performed other functions on an as-needed basis (DX 3; TR 31-32). As a dispatcher, he worked primarily in the mines, but was moved outside during his last year of employment (TR 33). He worked for Employer until October 1994 (DX 2). At that point, A.T. Massey bought the mine, and he was placed on the payroll of Performance Coal Company as a belt man (TR 33-34; EX 16; DX 3; DX 31). However, he injured his back in May 1995, and went on disability (DX 2; TR 25). He never returned to work, and officially retired in October 1998 (TR 25; EX 16). In 1996 through 1998, Claimant received payment from Performance in the amounts of $1,288.00 to $1,817.07 per year (DX 31). Claimant testified that these payment were for his insurance deductibles, holidays, and days he had worked that he was entitled to have off before Performance took over the mine from Employer (TR 34-36).

According to Performance's employee records, Claimant was terminated on March 20, 1995, and began working for Upper Big Branch Mine-South on March 21, 1995, about two months before his work injury (EX 16). However, Claimant testified that he continued on Performance's payroll even after his accident, and that he never received a letter of termination

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[1] The following abbreviations will be used when citing to the record in this case: DX–Director's Exhibit; CX–Claimant's Exhibit; EX–Employer's Exhibit; and TR–Hearing Transcript.

from Performance (TR 34-35). Further, Upper Big Branch Mine-South and Performance maintain the same mailing address and have the same payroll clerk; Claimant had the same employee number under both companies; and Claimant's social security statement of earnings lists Performance as the payor of all of Claimant's earnings from 1994 through 1998 (EX 16; DX 31).

Medical records from May 1986 to February 2000 are in evidence which show the condition of claimant's health over the past 15 years (EX 7; EX 9; EX 12). The first indication of coughing or breathing discomfort appears on May 11, 1986. On that date, Complainant was hospitalized complaining of dizziness, sweating, chest pain, and vomiting (EX 7, at 2). He had been coughing with mucus production for about two weeks before his hospitalization (EX 7). His lungs were clear (EX 7, at 3). He was diagnosed with paroxysmal atrial fibrillation, probably secondary to pericarditis (EX 7, at 6). Claimant checked himself out of the hospital on May 12, 1986 against medical advice (EX 7, at 4). He was again hospitalized on April 16, 1989, complaining of "nausea, vomiting, abdominal pain, shortness of breath, and almost blacking out" (EX 7, at 16). At that time, he reported having a chronic productive cough for the past two years (EX 7, at 18). He was diagnosed with paroxysmal atrial fibrillation with congestive heart failure and acute pulmonary edema. He had a secondary diagnosis of an acute peptic duodenal ulcer, hiatal hernia with reflux, and psoriasis (EX 7, at16). His medical records from January 1990 through March 1996 indicate that his lungs were relatively clear on his visits to his doctor during this time period, despite periodic complaints of flu-like symptoms, sinus infections, and coughing (EX 9, at 2-19). In May 1998, he visited Dr. Surayia Hasan, his primary care physician (TR 29), complaining of shortness of breath and coughing. Dr. Hassan started him on Ventolin and Flovent inhalers for his breathing difficulty (EX 12, at 7-8). The doctor also diagnosed him as having chronic obstructive pulmonary disease and pneumoconiosis. Claimant continued to report breathing difficulty and a productive cough, and Dr. Hassan continued to treat him with inhalers and a nebulizer through February 2000 (EX 12, at 9-13). At the hearing, Claimant testified that he still used inhalers for his breathing (TR 29-30).

In addition to his coal dust exposure as a possible cause of his coughing and breathing difficulty, the evidence in the record shows that Claimant has smoked cigarettes since he was at least 19 years old, although he told one of his examining doctors that he began smoking regularly when he was about 16 years old (TR 28; DX 13). Claimant testified that he currently smokes 10 to 12 cigarettes a day, but that he has smoked more in the past (TR 28). His medical records and doctors' reports throughout the years indicate that Claimant has smoked between one and two packs of cigarettes per day since he was 19 (EX 7, at 3, 17; EX 9, at 10; EX 12, at 10; EX 8, at 3; EX 13, at 4).

At the hearing, Claimant reported that was totally disabled and had not worked since his back injury in 1995 (TR 24). Claimant is currently receiving benefits for permanent total disability from West Virginia Workers' Compensation, benefits from Social Security disability, and benefits from his disabled United Mine Workers pension (TR 26; DX 4). He also received benefits for a 20% disability from occupational pneumoconiosis or silicosis from West Virginia in the 1980's (TR 25; DX 5).

B. Discussion

1. Responsible Operator

Employer contends that it is not the responsible operator in this case. Employer correctly points out that Claimant ceased working for it in October 1994, at which point he became employed with Performance Coal Company (EX 16). He worked for Performance from October 15, 1994 through March 20, 1995. On March 21, 1995, Performance's employment records show that Claimant began working for Upper Big Branch Mine-South, worked for this company until his back injury three months later, on May 10, 1995, and he remained on the payroll until October 1, 1998, when he retired (EX 16). However, there is substantial evidence that Performance Coal Company and Upper Big Branch Mine-South are in fact the same company; Claimant's Social Security statement of earnings reflects that he was on Performance's payroll from 1994 through 1998; the two companies share the same mailing address and payroll clerk; Claimant's employee number was the same at both companies; Claimant believed he was still employed by Performance even after his accident; and Claimant testified that he never received a notice of termination from Performance (DX 31; EX 16; TR 34-35). I find that Performance Coal Company was Claimant's employer from October 15, 1994 until he retired on October 1, 1998.

Employer further argues that because Claimant worked for Performance Coal Company for at least one calendar year after he left its employ, Performance is the responsible operator. However, the issue cannot be dispelled so simply, because Claimant did not actually engage in any work for Performance following his work-related injury in May 1995. Measuring only the time when Claimant actually engaged in work for Performance, his employment clearly does not measure a calendar year. Still, following the Benefits Review Board's decisions on this issue, I find that Performance Coal Company is the responsible operator in this case.

In the case of *Verdi v. Price River Coal Company*, 6 BLR 1-1067 (1984), the Board held that a "claimant's time on sick leave counts toward the requisite one year of coal mine employment . . . ." *Id.* at 1070. *See also Boyd v. Island Creek Coal Co.*, 8 BLR 1-458 (1986). In that case, a miner who had been working for a coal company for about 10 months sustained a work-related injury for which he convalesced on sick leave and then retired without returning to work. His retirement occurred slightly more than a year after he started working for that coal company. The Board held that since the miner's time off was due to a work-related injury it should be considered as time worked in determining whether the miner had worked for that employer for a least one year under §725.493(a)(1). Accordingly, the employer was held to be the operator responsible for the miner's claim. The facts in *Verdi* are similar to the facts in this case, where Claimant worked for seven months prior to his work related injury and continued on Performance's payroll for over three years until his retirement. I find for the purposes of determining the responsible operator in this case that Claimant worked for at least a year for Performance Coal Company, which therefore is the responsible operator. Accordingly, Peabody Coal Company is dismissed as a party in this case. Since the Director did not designate

Performance Coal as a putative responsible operator, the Director is now responsible for this claim.

2. Entitlement to Benefits

Since this claim was filed after December 31, 1981, the regulations contained in 20 C.F.R. Part 718 as amended on January 19, 2001[2] are applicable. In order to be eligible for benefits under that Part of the regulations, Claimant must prove that he is totally disabled due to pneumoconiosis arising out of his coal mine employment.

Pneumoconiosis can be established in several ways. First, under §718.202(a)(1)-(2), pneumoconiosis can be established by x-ray, biopsy, or autopsy evidence. The record in this case contains no biopsy (and, of course, no autopsy) evidence, so the x-ray evidence must be examined. There are in evidence 40 x-ray readings of 10 films taken between May 11, 1986 and December 12, 1999. 15 doctors read the films, 14 of whom are B readers (government-certified experts in interpreting x-rays for pneumoconiosis).[3] Of the 40 x-ray readings, 30 are entirely negative or find no pneumoconiosis, and 10 find pneumoconiosis with a profusion of opacities between 1/1 and 2/1 (CX 1-CX 9; EX 1-EX 4; EX 7-EX 9; EX 13; DX 15; DX 16; DX 18; DX 28; DX 29). Of the positive readings, Drs. Pathak, Miller, Patel and Cappiello found pneumoconiosis on the February 12, 1999 film (CX 4-CX 6; DX 18); Drs. Pathak, Aycoth, and Capiello found pneumoconiosis on the November 10, 1999 film (CX 7-CX 9); and Drs. Pathak, Aycoth, and Ahmed found pneumoconiosis on the December 8, 1999 film (CX 1-CX 3). None of these physicians' *curricula vitae* are in evidence, and I cannot evaluate their qualifications beyond recognizing that they are all B-readers, and that Dr. Patel is also a board certified radiologist (CX 1-9; DX 18).

In contrast to the positive readings, Drs. Wheeler, Scott, and Gayler read these same x-rays to show no pneumoconiosis (EX 1; EX 2; DX 29). They also found no pneumoconiosis on x-rays dating from December 23, 1986; December 10, 1996; May 11, 1998; and February 26, 1999 (EX 1-EX 3). Drs. Wheeler, Scott, and Gayler are exceptionally well-qualified radiologists from Johns Hopkins Medical School in addition to being B-readers, and I give their readings substantial weight (EX 1). In addition, Dr. Zaldivar, a highly qualified pulmonary specialist and B-reader, interpreted the November 10, 1999 and December 23, 1986 x-rays as showing no pneumoconiosis (EX 8, at 13, 15-20; DX 28). Further, Dr. Gaziano, a B-reader, and Dr. Navani, a B-reader and board certified radiologist, found no pneumoconiosis on the film from February 12, 1999. They interpreted the film at the request of the Director, an impartial party (DX 15; DX 16).

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[2] All of the regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

[3] Richard Daniel is the only doctor with x-ray interpretations in evidence who is not a B-reader (EX 7, at 7, 22; EX 9, at 14).

All of the x-rays that were read as positive were also read as negative by more qualified physicians. In addition, the negative readings are far more numerous than the positive, and several are by physicians who have no reason to be biased as they were done at the request of the Director. Giving greater weight to the negative x-ray readings, I find that the existence of pneumoconiosis has not been established under §718.202(a)(1) or (a)(2).

Pneumoconiosis can also be established under §718.202(a)(4) despite negative x-ray evidence "if a physician, exercising sound medical judgment" diagnoses pneumoconiosis. The record contains five reports by four physicians (DX 13; DX 28; EX 5; EX 8; EX 13).

Dr. Rasmussen, whose qualifications are not in the record, examined Claimant at the request of the Director on Feburary 12, 1999 (DX 13). On physical examination, he found normal chest expansion and diaphragmatic excursions, reduced breath sounds, and expiratory wheezing (DX 13). He also performed pulmonary function tests before and after bronchiodilators and arterial blood gas tests with and without exercise (DX 10; DX 14). Dr. Rasmussen did not himself evaluate any of Claimant's x-rays, but relied on the interpretation of Dr. Patel, who found pneumoconiosis with a profusion of 1/2 (DX 13; DX 18). In his report, Dr. Rasmussen noted that Claimant showed moderate obstructive ventilatory impairment and moderately reduced maximum breathing capacity, both of which were improved with bronchiodilators (DX 13). He then concluded that Claimant suffers from pneumoconiosis, stating

> This patient has a significant history of exposure to coal mine dust. He has x-ray changes consistent with pneumoconiosis. It is medically reasonable to conclude that he has coalworkers' pneumoconiosis which arose from his coal mine employment (DX 13).

Thus, Dr. Rasmussen based his opinion that Claimant has pneumoconiosis on Claimant's coal dust exposure and Dr. Patel's positive reading of one x-ray. He noted Claimant's 37 years of smoking as a risk factor, but concluded without further explanation that Claimant's coal dust exposure was "a major contributing factor" to his minimum to moderate loss of lung function. Dr. Rasmussen is not Claimant's treating physician (TR 29-30).

Dr. Zaldivar examined Claimant on December 23, 1986 and November 10, 1999, and both reports are in evidence (EX 8; DX 28). In his 1986 report, Dr. Zaldivar noted that Claimant's lungs were clear. He also conducted pulmonary function studies, from which he concluded that Claimant had a mild irreversible obstruction and normal diffusion (EX 8, at 5). Dr. Zaldivar concluded that Claimant had mild emphysema from smoking, and that he might have asthmatic bronchitis (CX 8, at 2). He found no clinical or radiographic evidence of pneumoconiosis (CX 8, at 2).

Dr. Zaldivar again saw Claimant in November 1999, and gave deposition testimony regarding his examination and medical report (EX 14; DX 28). He reviewed Claimant's medical history and an x-ray, and conducted pulmonary function tests before and after bronchiodilators

and arterial blood gas studies with and without exercise (DX 28). He noted that Claimant's lungs were clear, and saw no evidence of pneumoconiosis on the x-ray (DX 28). From his own examination and Claimant's medical records, Dr. Zaldivar concluded that Claimant had reversible airway obstruction, which he credited to asthma (DX 28). He explained in his deposition that Claimant's pulmonary function tests revealed a moderate airway obstruction (EX 14, at 14). However, Claimant's forced vital capacity improved 17% after he was given bronchiodilators and his forced expiratory volume improved 18% (DX 28; EX 14, at 15). From this improvement, Dr. Zaldivar concluded that Claimant had a reversible obstruction according to the American Thoracic Society guidelines (EX 14, at 15-17). He further testified that, because Claimant's diffusing capacity was within 5% of normal and he was a smoker,[4] his capillary beds were intact, not destroyed, which indicated Claimant's obstruction was caused by asthma (EX 14, at 16). Based on his examination, Dr. Zaldivar concluded that Claimant suffered primarily from an asthmatic condition, with some bronchitis and emphysema caused by smoking (EX 14, at 16; DX 28). He found that Claimant had no dust disease of the lungs (DX 28).

Dr. Fino's report supports Dr. Zaldivar's conclusion. Dr. Fino is board certified in pulmonary diseases (EX 15, at 4). He reviewed Claimant's medical history in May 2000. He found that Claimant had an obstructive impairment, but that the impairment did not result from coal dust exposure (EX 5, at 18). He noted that the reversibility of Claimant's pulmonary impairment indicated that the obstruction was caused by asthma, not pneumoconiosis (EX 5, at 18). He also found from the spirometric evaluations that Claimant's small airway flow was more reduced than the large airway flow and that "[t]his type of finding is not consistent with a coal dust related condition but is consistent with conditions such as cigarette smoking, pulmonary emphysema, non-occupational chronic bronchitis, and asthma" (EX 5, at 18; EX 15, at 8). In his deposition, Dr. Fino explained that he based this conclusion on the reversibility of Claimant's obstruction when given bronchiodilators and the absence of significantly reduced lung volumes (EX 15, at 9-10). He found that Claimant had emphysema caused by smoking, not coal dust exposure, explaining that emphysema from coal dust inhalation does not effect the rate of decline in lung function, or FEV1 level, whereas smoking related emphysema correlates directly with a worsening FEV1 level (EX 15, at 14).

Finally, Dr. Renn, a board-certified pulmonary specialist, evaluated Claimant on May 11, 1998, and his report is in evidence (EX 13). He found that Claimant had emphysema on his x-ray, but no pleural abnormalities consistent with pneumoconiosis. Claimant's spirometry tests showed a "moderately severe obstructive defect that does significantly improve following inhaled bronchiodilators" (EX 13, at 6). Dr. Renn concluded that Claimant had asthma and pulmonary emphysema, but not pneumoconiosis or any other respiratory impairment from coal dust exposure (EX 13, at 7). Like Drs. Zaldivar and Fino, Dr. Renn noted that Claimant's obstructive defect improved with bronchiodilators, which is inconsistent with pneumoconiosis (EX 13, at 8).

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[4] Dr. Zaldivar explained that smoking artificially lowers an individual's diffusing capacity (EX 14, at 16).

Of the five medical reports, only Dr. Rasmussen diagnosed pneumoconiosis. Further, he based his diagnosis only on the x-ray interpreted by Dr. Patel, which I have found to be incorrect based on the more probative negative x-ray readings in evidence, and Claimant's exposure to coal dust. While he performed pulmonary function tests, he did not address the fact that Claimant's obstruction improved with bronchiodilators in making his diagnosis. In contrast, Drs. Zaldivar, Fino and Renn's opinions finding no pneumoconiosis are well explained – particularly in Dr. Zaldivar and Fino's deposition testimony – and consistent with one another. I find that the medical opinions of Drs. Zaldivar, Renn, and Fino outweigh the medical opinion of Dr. Rasmussen in this case. Claimant clearly has a respiratory impairment, but he does not have coal workers' pneumoconiosis or a respiratory or pulmonary impairment related to his coal mine employment. Therefore, the requirements of § 718.202(a)(4) have not been met.

Finally, a finding of pneumoconiosis can be made in accordance wit the presumption contained in §718.305. But this presumption is inapplicable because the claim was filed after December 31, 1981.

Thus, Claimant has failed to establish that he has pneumoconiosis, and his claim must be denied.[5]

[5] Because his claim is being denied, there is no reason to consider whether he has a totally disabling respiratory or pulmonary impairment.

ORDER

IT IS ORDERED that: (1) Peabody Coal Company and its carrier, Old Republic Insurance Company, are dismissed as parties to this case; and (2) the claim of Estace Clay, Jr. for black lung benefits is denied.

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JEFFREY TURECK
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any interested party dissatisfied with the Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision and Order by filing a notice of appeal with the **Benefits Review Board, P.O. Box 37601, Washington, D.C. 20013-7601**. A copy of the notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.